SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 660

ELBERT B. LINDSEY AND E. R. LINDSEY,
Petitioners,

vs.

STATE OF WASHINGTON,
Respondent.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

MAY IT PLEASE THE COURT:

The final opinion of the court of last resort of the State of Washington, the Supreme Court, is reported in Vol. 87, Washington Decisions, No. 5, of Sept. 2, 1936, at page 298; 61 Pac. (2d) 293. A full copy set out in Record pp. 87-92.

This opinion affirms the conviction and sentence of the Superior Court of Spokane County, Wash., as to each petitioner (R. 50, 51), wherein each petitioner is sentenced to a term of imprisonment of "not more than fifteen years", in the penal institutions, and

> "The said defendant (s) is hereby remanded to the custody of the sheriff of said county to be detained and delivered into the custody of the proper officers for transportation to, and confinement in said institution."

That under its constitution the said Supreme Court is the court of last resort of the State of Washington:

> "The judicial power of the state shall be vested in a Supreme Court, superior courts, etc." Art. VI, Sec. 3 Const.

II.

Jurisdiction of This Court.

The jurisdiction of the United States Supreme Court over the subject matter embraced in this petition is upheld by:

Art. III, Sec. 2, of United States Constitution:

> "The judicial power shall extend in all Cases, in Law and in Equity, arising under this Constitution • • •"

and by Sec. 237 of the Judicial Code of the United States, being Act of Feb. 13, 1925, Chap. 229, 43 Stat. 936, being Sec. 344, Title 28, U.S.C.A., page 205, as follows:

> "SEC. 237 (b). It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination • • • any cause wherein a final judgment or decree has been rendered or passed by the highest court of the state in which a decision could be had where is drawn in question • • • the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any right, privilege or immunity is specially set up or claimed by either party under the constitution • • •."

(2) Section (a) of the Act of Congress of Feb. 13, 1935, (U. S. Code, Title 28, Sec. 350; 43 Stat. L. 936) provides:

> That no • • • certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree • • •.

The final judgment in this case is dated Nov. 2, 1936, and filed in the Superior Court Nov. 4, 1936 (R. 76).

The date of the judgment on remittitur is the date from which the "three months" commences to run, as was held in:

Puget Sound Light & Power Co. et al. v. *King County*, 264 U. S. 22.

The application for writ of certiorari was presented to the Clerk of the United States Supreme Court on the 16th day of January, 1937 (R. 94).

(3) Does the record sustain jurisdiction?

(a) The judgment asked to be reviewed is final. The Supreme Court said (R. 92):

> "We find no prejudicial error in the trial of the case, and the judgment is affirmed."

The judgment (s) (R. 50, 51): are sentences of each petitioner to a term of imprisonment of "not more than fifteen years." "That the said defendant shall stand committed to said institution (penitentiary and reformatory) until this sentence is complied with."

(b) It is a judgment of the court of last resort of the State of Washington. Art. VI, Sec. 3 of State Const., (quoted *supra*).

(c) The first question, that the sentences are void as being *ex post facto*, is a direct question under the Federal Constitution.

The sentences (R. 50, 51) for a term of "not more than fifteen years" are the maximum sentences provided by the statutes of the State for Grand Larceny, R. R. S. 2605 (set out p. 3-4 of petition) and are such sentences as are directed to be pronounced under Chap. 114, Laws of Wash. 1935, Sec. 2 (set out Pet. 5-6), "The court shall sentence such person to the penitentiary • • • and shall fix the maximum term of such person's sentence only." This law did not come into effect until June 12, 1935. The offense was

alleged to have been committed "on or about April 15, 1935."

The 1935 enactment also provided (Pet. 6):

> "the board • • • shall fix the duration of his or her confinement."

At the time of the commission of the offense, if any, April 15, 1935, the statute R. R. S. 2172 (Pet. 5) provided that the court should fix the term of confinement.

Also Rem. Rev. Stat. 2281 (Pet. 4) which was repealed by Chap. 114, Laws of 1935, provided on April 15, 1935, that the court should fix a "minimum term" and also a "maximum term", each of which should be in the court's discretion, and in its discretion the "maximum might be fixed at less than the maximum provided by the law denouncing the offense." The court could fix a maximum less than 15 years under the old law, but cannot under the new. The new law also placed the fixing of the term in a ministerial board, instead of the court.

This was claimed, in the Supreme Court of Washington (R. 63) (Pet. 2) to be a void sentence under Art. 1, Sec. 10 of the United States Constitution.

This contention was denied by said court (R. 91-92) (Pet. 2).

The record and laws set out show a direct federal question, presented and refused, and the question is now one for this court.

(d) The second question presented (Pet. 8) "that all the proceedings were so violative of petitioners' fundamental rights under the 14th amendment, as to be void" is sustained by the record as follows:

(a) As to the coercing one of the petitioners for the purpose of obtaining incriminating statements, and using same: (The extracts from the record are set out in Petition 8-10, and not repeated for sake of brevity.)

Exhibit No. 2, the written statement obtained and used as evidence is found (R. 37-38).

The decision of the Supreme Court, so far as it went, on this question is set out (Pet. 10).

(b) That the prosecutor secured and used as impeachment, judgments and sentences in case No. 11045-25867, which judgments and sentences were, after being so used, held by the courts to be void, and that petitioners have been denied the right in any court to show that fact (Pet. 11).

The said judgments and sentences were founded on a charge of Attempted Grand Larceny (R. 66):

> "That on May 3, 1935, the Deputy Prosecuting Attorney of Spokane County, Washington, filed two criminal informations against the defendants, jointly; that one of the cases was brought on for trial on June 12, 1935, the said Deputy Prosecutor, one C. C. Quackenbush, representing the State of Washington • • • (R. 66) that in order to obtain a conviction the said Quackenbush • • • put before the jury in his argument false and libelous statements of and concerning the defendants • • •.
>
> "And this court (Sup. Ct. of Wash.) on Jan. 10, 1936, sustained and upheld the contention of defendants, and in said case of State *v.* Lindsey, 185 Wash. 206 held said convictions to have been illegally obtained • • •."

Said case of *State* v. *Lindsey,* is reported in 185 Wash. 206; 52 Pac. (2nd) 1246, and is in part as follows:

No. 25867 of Supreme Court. No. 11045 of Superior Court.

January 10, 1936.

> "The defendants were charged with the crime of attempt to commit the crime of grand larceny." • • •
>
> "Neither appellant took the witness stand. During the closing argument to the jury, the prosecutor said:
>
> If we want to send Elbert B. Lindsey to the penitentiary as his counsel has suggested, we have a much

greater crime that we could have charged him with than this, one that he might have been charged with and much more easily convicted; this is just a small matter • • •."

"So far as E. R. Lindsey is concerned he is so hardened in crime that there is no hope that he will ever reform."

"In a case such as this, where 'intent to defraud' is an essential element and is, necessarily, inferrable only from the facts and circumstances surrounding the transaction, the remarks of counsel, reflecting on the character of appellants was highly prejudicial."

"The judgment is reversed and the cause remanded, with instructions to grant appellants a new trial."

The sentences used for impeachment (Exhibits 3 and 5, R. 38, 40) were for a term of seven and a half years, being the maximum allowed under Grand Larceny, Attempt. The offense was alleged to have been committed prior to May 3, 1935. The petitioners were therein sentenced on July 10, 1935 (R. 38, 40). They were sentenced under Chap. 114, Laws of 1935, which came into effect on June 12, 1935, and which denied them their rights under R. R. S., Sec. 2281, as set out hereinbefore.

On November 21, 1936, the U. S. District Court at Walla Walla, Wash., in *Andrus* v. *McCauley et al.*, No. L. 1421 (opinion appended) in passing on the effect of this 1935 enactment, said:

"Mathematically the operation of Sec. 2 of the 1935 enactment inflicts a greater punishment than the law inflicted at the time the offense was committed • • •"

and

"That the enactment of 1935, so far as it attempted to be applied to the sentence and term of confinement of petitioner is *ex post facto* in effect • • •."

Is the procuring of void judgments and sentences against an accused person, and using the same for impeachment and to cast aspersions and burdens on the defendants when they

take the stand in their defense in another case, before defendants can have them set aside; and when such judgments and sentences are thereafter set aside by competent courts, and then not allowing defendants to show the invalidity and thus avoid the effect of the illegal judgments, a violation of the rights guaranteed under the 14th Amendment of "due process," and a denial of their right to "defend themselves when assailed in court by the State"!

The defendants did so offer themselves as witnesses:

(R. 18.) "Elbert B. Lindsey, called as a witness by the defense."

(R. 26.) "E. R. Lindsey called on behalf of the defense."

(R. 23.) "States exhibit No. 3, commitment of Elbert B. Lindsey received in evidence and marked." (Said commitment being for a term of seven and a half years in Case No. 11046.) (R. 38.)

(R. 32.) "States exhibit No. 5 admitted in evidence, being a commitment of E. R. Lindsey." (Said commitment being for a term of seven and a half years in case No. 11045.) (R. 40.)

The refusal to allow petitioners to show that the judgments and sentences had been held illegal, was urged by motion in arrest of judgment and motion to re-open, and to be a violation of their fundamental rights under the 14th Amendment, as fully set out in (Petition, pp. 6-10) and is referred to without repetition. This contention was denied by the Supreme Court, without opinion (R. 75, 86).

It was a denial of "due process" in that it was a denial of petitioners' fundamental rights to defend themselves when assailed, and to have their evidence go to the jury unburdened with any illegal and void aspersions. It was a denial of any trial at all.

(c) (Pet. 16.) That Elbert B. Lindsey was denied coun-

sel in violation of his rights under the VI Amendment is shown by:

(R. 19.) (During the "quizzing" by the State's prosecutor):

> "I asked three or four times for an attorney to be present so I could be represented, but I was refused."

And (R. 3.) (Statement of Facts) (R. 88, opinion of Sup. Ct.):

> "and defendant Elbert B. Lindsey objecting to proceeding with the trial by reason of the fact that he was unable to employ counsel, and that counsel had just, at that time, been appointed for him, and that he had no time to consult with counsel or prepare his case, which objection was over-ruled and exception taken by said defendant • • • and the court having ordered that the trial proceed • • •."

This contention among others was presented to the Supreme Court as a violation of the appropriate provision of the Federal Constitution, and while mentioned in the opinion (R. 89) the question under the Federal Constitution was not passed on.

(d) (Pet. 16.) That petitioners, and especially E. R. Lindsey, were tried under a statute and under allegations in respect thereto—by the instructions submitted to the jury—which allegations were not charged in the information on which the case was purported to be tried, thus depriving them of *notice* and an opportunity to defend after notice.

The facts as they appear by the record, the statutes, and the claim of Constitutional rights in respect thereto, are fully set out in (Petition, pp. 16-21) and are referred to, without repetition.

The record fully shows that petitioners were tried on facts and allegations, submitted to the jury, with which they had never been charged by information, and were not given

"Due process"; that the claim was fully presented to the Supreme Court, and by that court denied.

(e) The question of a judgment of "guilty" being entered on a verdict "which was in law a verdict of acquittal" and that instead of being sentenced, defendants are entitled to their discharge, has also been fully set out (Pet. 22-23) and the manner in which their claim under the 14th Amendment was made, and refused.

The jurisdiction in this Court is complete.

The following cases are cited as sustaining petitioners' contention that this Court has jurisdiction:

> "The Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the State court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."
>
> *Lawrence* v. *State Tax. Com. of Mississippi*, 286 U. S. 276-282.

> "The judicial power shall extend to all Cases, in Law and in Equity, arising under this Constitution • • •."
>
> Article III, Section 2, United States Constitution.

> "The appellant insists that the circuit court has no jurisdiction of this case, because all the parties are citizens of Tennessee. We think, however, that jurisdiction exists because the case is one arising under the Constitution of the United States, the complainant insisting that under such constitution the law of the State of Tennessee, passed in 1903, is invalid, because it impairs the obligation of contract protected by that instrument."
>
> *Illinois C. R. Co.* v. *Adams*, 109 U. S. 28-35, 21 S. Ct. 451, 45 L. Ed. 410-412.

"The claim that the action of the State board of equalization in making the assessments under consideration was the action of the State, and if carried out would violate the provisions of the 14th amendment to the Constitution of the United States by taking property of the appellee without due process of law, and by failing to give it the equal protection of the laws, constitutes a federal question beyond controversy.

"How that question should be decided is another matter."

Raymond v. *Chicago Union T. Co.*, 52 L. Ed. 78-87.

"The provisions of the 14th amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. These provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever by virtue of public position under a state government, deprives another party of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the state, and is clothed with the State's powers, his act is that of the state."

C. B. & Q. R. R. v. *Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979.

III.

A full statement of all that is material to a consideration of this petition has been set out in the petition under statement "A", and for the sake of brevity, it is not repeated here, but is referred to and made a part hereof, as though repeated.

IV.

Specification of Errors.

Petitioners claim that the Supreme Court of the State of Washington erred in the following:

1. That the said court erred in holding that the sentences of petitioners did not violate the inhibition contained in

Sec. 10, Art. I of the Constitution of the United States, against *ex post facto* laws.

2. That the said court erred in affirming the judgment of the trial court and in not specifically passing on petitioners' contention that R. 58):

> "This trial and the procedure had thereunder and the instructions quoted above violate the IV, V, VI and XIV amendments to the Constitution of the United States."

3. That the said court erred in not passing on the question of the constitutionality of the following (Opinion, R. 89):

> "(I) The first assignment is directed to the overruling of objections to the admission in evidence of statements attributed to one of the defendants in the presence of police officers while, as it is claimed, such defendant was held in custody and the statements were made under duress, all in violation of the Constitution of the United States and of this state."

4. That the said court erred in not passing on petitioners' contention that it was a violation of the "due process" guaranteed by the 14th amendment to the Constitution of the United States, for the State to procure a conviction by means of the use of previous judgments and convictions and sentences on a felony charge, of each of petitioners, which judgments and sentences, were before the termination of the proceedings in the Supreme Court, held by the same Supreme Court to be illegal, and by the Federal courts, like judgments held to be void, and which in all substantial effect, denied petitioners the right to defend themselves when assailed, by burdening their testimony with illegal aspersions, and then by the said Supreme Court refusing to allow petitioners in any manner to show the fact that the judgments and sentences, so used by the state, were held void and illegal by competent courts.

5. That the said Supreme Court erred in not passing on the contention of petitioners' that it was a denial of due process as to them as guaranteed by the 14th Amendment to the United States Constitution, to submit to the trial jury, and in all substantial effect try petitioners on a charge not embraced in the information, and on and under a statute that required further allegations, and allegations not charged in the information; thus denying petitioners "due process" or "any process".

6. That the said Supreme Court erred in not passing on petitioners' contention, that it was a denial of "due process" under the 14th amendment to the United States Constitution, to enter a "judgment of guilty as charged" when the verdict, in law was a verdict of "acquittal" of each defendant.

7. That the said Supreme Court erred in not passing on petitioners' contention that for the State to deny to Elbert B. Lindsey at all times, in substance, an attorney to assist in his defense, was a denial of his rights under the VI and 14th Amendments to the Constitution of the United States.

V.

ARGUMENT.

The first reason urged for the granting of this writ is that the sentences of petitioners were under a law passed after the date of the alleged commission of the offense, and that the new law increased the punishment and in other respects changed the situation of petitioners to their disadvantage, and therefore the sentences are void under Art. 1, Sec. 10 of the Federal Constitution.

The date alleged for the offense was: "On or about April 15, 1935" (Pet. 2).

The new 1935 enactment took effect June 12, 1935 (Pet. 4).

The date of trial was Sept. 12, 1935; the date of sentence was Nov. 1, 1935 (Pet. 4).

The laws of the state on April 15, 1935 (R. R. S. 2281, Pet. 4) required the court to fix a "minimum and a maximum sentence."

The 1935 enactment prohibited the court from fixing any term but the maximum (Pet. 5-6).

The sentences (Pet. 4) were for a term "of not more than fifteen years." A "maximum sentence" only under the 1935 enactment.

In *Kring* vs. *Missouri*, 107 U. S. 221-226, 27 L. Ed. 506-509, this Court said:

> "No one can be criminally punished in this country, except according to a law prescribed for his government before the supposed offense was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, because the rule exists in the form of an express written precept, the binding force of which no one can dispute. No State shall pass any *ex post facto* law is the mandate of the Constitution of the United States."

The question of the effect of abolishing the former law which provided that the court "shall fix a minimum," etc., was brought up in a "forgery" case, to which the said Sec. 2281 applied, as well as to "larceny" involved in this case, and the effect of the said Chap. 114, Laws of 1935 of Washington, reviewed, by Kavanah, Judge, in the case of *Andrus* v. *McCauley et al.*, in the U. S. District Court, at Walla Walla, Wash. (A full copy of Judge Cavanah's opinion is appended hereto), and therein he said:

> "Mathematically the operation of Sec. 2 of the 1935 enactment inflicts a greater punishment than the law inflicted at the time the offense was committed • • •." and

"that the enactment of 1935, so far as it attempted to be applied to the sentence and term of confinement of petitioner is *ex post facto* in effect • • •."

Citing, *Ex Parte Medley*, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835.

R. R. S. 2281, which was repealed on June 12, 1935, contained a provision that the court should exercise its "discretion" in fixing the sentence. It was a statutory right to have the court so fix the sentence, a maximum and a minimum.

The 1935 enactment (Pet. 5-7) takes this power away from the court or judicial authority and places it in a "ministerial board."

"if it (the law) substitutes the discretion of the board of prison directors for the statutory right, then we must hold the law *ex post facto*, even though the board of prison directors • • • might deal more leniently with the convict."

Ex Parte Lee, 171 Pac. 958 (Cal).

The 1935 enactment (Pet. 7) (Sec. 4) provides (which is a new provision in this state):

"The board • • • shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion • • •."

"From and after the suspension, cancellation or revocation of the parole of any convicted person and until his return to custody, he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee or fugitive from justice shall be a part of his term."

In *State* v. *Tyree*, 78 Pac. 525, 3 Ann. Cases 1020 (Kan.), in passing on a similar statute, said:

"There is another provision of Sec. 3 of the Act of 1903 which might result to the material and substantial disadvantage of the appellant. It is there provided

that if a prisoner violate a parole he shall be arrested and compelled to serve out the unexpired term of the maximum imprisonment, and the time from the date of the declared delinquency to the date of his arrest shall not be counted as any portion or part of the time served. Other provisions of the Act authorize the prison board to make rules and stipulate conditions in the parole, a violation of which, although not a violation of law, would subject the paroled prisoner to rearrest and reimprisonment. The time intervening the declared delinquency and the arrest not being deducted from the maximum time, the period within which appellant might obtain his liberty is extended beyond the maximum time for which he could have been sentenced; this excess of time depending upon the activity or negligence of the officers whose duty it was to issue a warrant or execute the same for his arrest. For these reasons the sentence imposed was *ex post facto* and should be set aside."

The Supreme Court of the State (Pet. 2) denied the challenge of petitioners that the sentences are *ex post facto*.

The District Court of the United States, and other courts, including this court, have always held such sentences to be *ex post facto* and void. Defendants were denied their rights under Art. 1, Sec. 10 of the Federal Constitution.

The second contention raised (Pet. 8) is that there was such a denial of fundamental rights, as guaranteed by the United States Constitution, V, VI, and XIV amendments, as to make any judgment and conviction rendered void, as set out:

(a) (Pet. 8). By unlawfully coercing, and compelling him to give evidence against himself, at a time when the State was conducting the inquisition, and when said defendant, Elbert B. Lindsey, demanded and was denied an attorney for his defense.

(b) (Pet. 11). By the State securing convictions and sentences against each of petitioners, which were illegal and void, and which have been so declared since by courts of competent jurisdiction; that when these petitioners took the witness stand in their own defense—being tried before they could have the illegal convictions so declared by the appellate court—that the State used said convictions and sentences to unlawfully burden and cast aspersions on petitioners' testimony; and then by the State denying petitioners the right to show that the convictions have been declared illegal and void; thus denying petitioners in all substantial effect the right to defend themselves when assailed.

(c) (Pet. 16). By denying petitioner Elbert B. Lindsey counsel when put through an inquisitorial proceeding by the State, he so demanding counsel; and by in all substantial effect denying him counsel at the trial, by not allowing him to consult with the counsel, just at that time appointed for him, and by not allowing him counsel to prepare his defense, he being at all times confined in jail.

(d) By charging the trial jury, and in effect trying petitioners, and especially E. R. Lindsey, on a charge concerning which no information had ever been filed, and none of the legal formalities complied with; thus giving petitioners no *notice*.

(e) (Pet. 22). By charging petitioners in the information, jointly, under one state of facts; that after all parties had rested submitting the case to the jury, as to E. R. Lindsey on a state of facts and law not charged, and which required, if charged additional allegations; by putting the case to the jury as to each defendant on several statutes—one not charged—and charging the jury as to each defendant severally, on facts several as to acts, several as to

time, several as to place, and several as to law, and then charging the jury if they found one defendant guilty under one charge and the other guilty under the other charge, *to bring in a joint verdict of guilty as charged in the information,* which in law was a verdict as to neither, and then entering on said verdict a judgment of "guilty as charged in the information" as to each defendant; when the court had already charged the jury to "find E. R. Lindsey not guilty of the acts charged in the information."

These matters were all raised by appropriate claims of constitutional rights as set out in the petition, and all ignored and a decision as to the constitutional rights refused by the State Supreme Court.

The following decisions would seem to be applicable:

On claim (a) (Pet. 8) (Assignment of error No. 3).

The laws of the State of Washington (Pierce Code #9214, R. R. S. Sec. —) provide:

> "and any person accused of crime in this state • • • may in the examination or trial of the cause, offer himself or herself, as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examination of other witnesses; Provided, That nothing in this Code shall be construed to compel an accused person to offer himself or herself as a witness in such case."

The salient facts are set out in Petition pp. 8-10.

The Constitution of the United States, Art. V, provides:

> "No person • • • shall be compelled in any criminal case to be a witness against himself."

The Supreme Court of the State of Washington, in *State* v. *Miller,* 61 Wash. 125; — Pac. —, condemned this practice, as to other persons in this state, and petitioners are

entitled under the XIV Amendment to "the equal protection of the laws." And the court there said:

> "The Prosecuting Attorney was there for a purpose. The Evident purpose was to obtain a confession from appellant. • • • The effect of solitary confinement on the mind of a person charged with crime may be imagined. It is a well-known psychological fact that men and women have frequently confessed to crimes which they did not commit."
>
> "Neither policemen, detectives nor jailors are clothed in this country with inquisitorial powers."
>
> "It is true that some of the laws of Spain have been ingrafted in ours • • • such as the dungeon. These belong to the age of bigotry, intolerance and suspicion, and have no place in our civilization. Any attempt to revive them, even in a mild form, ought to call for the execration of the people, and a severe condemnation of the law. • • • Every man is innocent until proven guilty. • • • This • • • rule has been reversed by the process and practices shown by the record."

The conviction was set aside in that case; is it "equal protection of the laws" to allow such practices to be used against petitioners? It surely is not.

This Court in *Brown* v. *Mississippi*, decided Feb. 17, 1936, Supreme Court Advance Opinions of March 1, 1935, p. 427 said:

> "But the question of the right of the State to withdraw the privilege against self-incrimination, is not involved here. The compulsion to which the quoted statements refer is that of the process of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter."
>
> "The rack and torture chamber may not be substituted for the witness stand."

See also:

Bram v. *U. S.*, 168 U. S. 532, 18 S. Ct. 183, 42 L. Ed. 568;

Wan v. *U. S.*, 266 U. S. 1, 69 L. Ed. 1.

On claim (b) (Pet. 11).

The previous convictions and sentences, of each of the petitioners found in the Record at pp. 38-41, in case No. 11045, as shown by the number thereon, were introduced in evidence on Sept. 12-13, 1935. The same convictions were held to be illegal and reversed by the Supreme Court of this State in the case of *State* v. *Lindsey*, found at 185 Washington reports, at page 206; 52 Pac. (2d) 1246, of date January 10, 1936.

Such sentences were also held void by the U. S. District Court, on Nov. 21, 1936. *Andrus* v. *McCauley* (opinion appended).

In the case of *State* v. *Harrass*, 22 Wash. 57; 60 Pac. 58 which was a case wherein defendant wished to call a witness who had been convicted of perjury, and his case was on appeal. The witness was not allowed to testify. Soon thereafter the conviction for perjury was set aside. And the Supreme Court said:

(After holding that it was not error for the trial court to reject the witness) (A condition on all fours with this case).

> "But we cannot overlook the fact that appellant has been deprived of the benefit of the testimony of a witness, not because of any act for which he is responsible, but because of the illegal judgment of conviction against such witness. Manifestly he has not had the benefit of those rights which are vouchsafed to him by the constitution, among which is the right to have witnesses examined in his behalf. He has committed no act by which the right has become forfeited. The error was not of his making • • •. Here is a condition never contemplated by the legislature. If the defendant has been deprived of the right to make a defense through no

> fault or neglect of his own, it would be a shame and a reproach to the law to hold him accountable for the laws mistake. The case • • • involves the larger question of a defendant's right to have witnesses examined in his behalf. It involves the constitutional right to a fair trial. No duty which the court owes society can rise above that of preserving inviolate those principles which make effective the constitutional guaranty of a fair trial • • •.
>
> It is not enough that the record should satisfy us of the actual guilt of the prisoner.
>
> The duty is upon the state to demonstrate his guilt by legal evidence, upon a fair trial, where no constitutional or legal right is denied him."

In the recent case of *State* v. *Navone*, 186 Wash. Rep. 532-539, 52 Pac. (2d) 1208, the Supreme Court of this State in speaking of the effect of illegal aspersions against the character of accused, said:

> "The only question before the jury was the question of intent; and upon that question, whether or not the appellants were men of integrity and honesty and whether or not they testified truthfully, bore with peculiar force. If, in fact, they were men of good character, their testimony would have weight; but if of bad character, that, coupled with their interest in the result, would tend to wholly destroy their credibility."
> • • •
>
> "This question of character bears with peculiar force upon the issue of intent, and the character of appellants having been destroyed with a single blow, the jury • • • must necessarily have been greatly influenced thereby in determining the issue of intent. The ordinary direction to disregard could not restore the minds of the jurors to that fair and impartial state which the law requires."

In the two cases last cited the Supreme Court of this State safeguarded the interests of defendants and awarded a new trial.

It is an open denial of "the equal protection of the laws" to deny petitioners the same protection. They are entitled to this under the 14th amendment.

> "It was alleged that plaintiff in error was clearly guilty and therefore the improper cross-examination and incompetent evidence did him no injury.
>
> That was the issue for the jury to try, and the law does not provide one method for trying innocent persons and another for trying guilty persons. The plaintiff in error had a right to trial by jury, on competent evidence, and to have his witnesses appear without any illegal disparagement of his credibility. The question is not what, with the aspersions against the witness wrongfully appearing in the record, we may think of the guilt or innocence of the plaintiff in error, but what the jury would have done if the case had been submitted to them without those aspersions.
>
> The rule that a judgment will not be reversed where the evidence clearly shows the defendant's guilt, does not justify a total disregard of the rights of a prisoner upon his trial for an alleged offense. He still has a right to be tried by the law of the land, and a conviction secured by a trial in total disregard of the law cannot be sustained."
>
> *People* v. *Newman*, 103 N.E. 589-591 (Ill.).

> "Whenever a party seeks to avail himself of a former judgment fraudulently obtained, the opposing party may show the fraud and thus avoid the judgment. In criminal issues this is settled law."
>
> *U. S.* v. *Bradford*, 148 Fed. 413-427;
>
> *Wharton Criminal evidence* (9th Ed.) Sec. 595.

In *McClatchy* v. *State* (Cal.), 51 Pac. 699, the Supreme Court of that State said:

> "That the result of this action of the court in thus requiring petitioner, in effect to submit his defense upon the evidence of the people, was, in substance and effect to deprive petitioner of the right to be heard in his defense, is, we think obvious."

"It was error, certainly, but it was more than that. It was a transgression of a fundamental right guaranteed to every citizen charged with an offense • • • of being heard before he is condemned to suffer injury. Any departure from those recognized and established requirements of law however apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction, as where there exists an inceptive lack of the power.

The substance and not the shadow determines the validity of the exercise of power."

Citing: *Cable Co.* v. *Adams*, 155 U. S. 689-698; 14 S. Ct. 258-260.

Claim (c) (Pet. 16).

(R. 19) (Pet. 9.) "Elbert B. Lindsey" "I asked three or four times for an attorney to be present so I could be represented, but I was refused."

(R. 3.) "Elbert B. Lindsey objected to going to trial because an attorney had just, at that time been appointed for him, and he had no time to consult with counsel or prepare his case."

"The state may not deny to the accused the aid of counsel."

Brown v. *Mississippi*, U. S. S. Ct. Adv. Dec., March 1, p. 427;

Citing *Powell* v. *Alabama*, 287 U. S. 45-53; 53 S. Ct. 55.

Wherein it was said:

"Where a person without legal knowledge is confined in jail and absent from his friends, without the aid of legal advice, or the means of investigating the charge against him, it is impossible to conceive of a fair trial where he is compelled to conduct his case in court without the aid of counsel. Such trial is not far removed from an ex parte proceeding • • • and state decisions which refer to the matter invariably recognize the right to the aid of counsel as fundamental in character."

Claim (d) (Pet. 16). That E. R. Lindsey was tried on a charge not embraced in any information filed; as well as the same charge being in the instructions submitted as to Elbert B. Lindsey, it being a joint trial, and that each petitioner was tried on a separate charge, several as to all its elements, and as to the law, and a joint verdict rendered thereon; which was a verdict as to neither, but was in effect a verdict of acquittal.

The information filed (R. 1) (Pet. 2) was a joint information, under R. R. S. 2601 sub-div. 2 (R. 44) (Pet. 3) in effect larceny by means of a false token.

The sufficiency of the evidence was challenged by each of petitioners, at the close of all the evidence (R. 35-36) (Pet. 17).

The court then charged the jury (R. 44) (Pet. 17-18) under R. R. S. 2601-2:

> "Any person who shall with intent to defraud make, or draw or utter, or deliver to another person and check, or draft, on a bank or other depository for the payment of money, • • • etc."

And charged the jury as to E. R. Lindsey (R. 45) (Pet. 19) under those elements viz:

1. That E. R. Lindsey drew the check.
2. That he delivered it, etc., and
3. Charged the jury as a matter of law that it was drawn on a bank or depository for the payment of money—specifically, "a bank" "the bank on which it was drawn."

There was no such charge in any information.

The purported check *was not drawn on a bank* (R. 1).

A trust company is not *prima facie* "a depository for the payment of money." And there is no charge that it was such.

> "The offense is complete only when the check or draft is made or drawn, etc., on any bank or depository

for the payment of money or its equivalent • • •."
State v. *Yarboro*, 140 S. E. 216-218.

This Court said in *Powell* v. *Alabama*, 287 U. S. 45:

> "It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to an enforcible judgment, and that they, together with a legally constituted tribunal having jurisdiction of the case, constitute the basic elements of the Constitutional requirement of 'due process of law'."

In *Gavieres* v. *U. S.*, 220 U. S. 338-342, 31 S. Ct. 421, 55 L. Ed. 489-490, this Court said:

> "A single act may be an offense against two statutes; if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment for the other."
>
> "Applying this principle, it is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment. In the second case it was necessary to aver and prove *the insult to a public official or agent.* • • •
>
> "Without such charge and proof there could have been no conviction under the second case."

Likewise without an averment in the information:

"That E. R. Lindsey drew the purported check:

"That he delivered it, and

"That it was drawn on a bank or depository for the payment of money." *Which averments were entirely lacking,* E. R. Lindsey could not have been convicted under the charge in the instructions to the jury (R. 45) (Pet. 19-20), and (R. 45) (Pet. 20) (Instruction):

> "If, on the other hand, the state has failed to prove each of the foregoing elements to your satisfaction, beyond a reasonable doubt, then it would be your duty to acquit the defendant, E. R. Lindsey."

The verdict in law was an acquittal of E. R. Lindsey.

And Elbert B. Lindsey could not be convicted, on a joint charge, with such an instruction before the jury.

> "The indictment charges both appellants in precise terms with the commission of a joint offense. The act charged was a joint act. The indictment was faultless on its face; it contained all the requisites of a good pleading, but of what avail was it to the appellants; they met it in the usual form; and having closed their defense, the jury were instructed that the plaintiffs in error might be found guilty of the joint charge of which they were accused if the evidence only showed that they had separately been guilty of it, although it did not show that they were both together engaged in the same act.
>
> In giving this instruction there was error. It was equivalent to saying to the jury "you may convict them of the joint offense alleged against them, although the proof satisfies you that they were not guilty of it, provided, it convinces you that each one separately has committed an offense of a like nature. If this were the law, it would be of little use to require an indictment. In fact it could not be said with much propriety, upon the supposition that there was proof to make the charge of the court applicable, that plaintiffs in error were convicted upon any indictment. If the proof only showed that they had been separately engaged in different acts, it by no means supported the indictment, and the verdict was wholly without proof to sustain it."
>
> *Stephens* v. *State,* 14 Ohio 386-389.

Such is exactly the situation in this case.

Claim (e) (Pet. 22). That the verdict was a verdict of acquittal.

In *McGehee* v. *State,* 58 Ala. 360, it was so held.

> "If it had been averred in this indictment that the two defendants had committed separate distinct offenses at different times, neither being present nor participating in the offense of the other, a demurrer to the

indictment would have lain, notwithstanding the two offenses charged are identical in character. This is on the well defined ground that on such trial it would be necessary to offer proof of two independent transactions.

On like principles, if two offenders are charged in one indictment, which is faultless in form, and it be developed in the evidence that the two defendants committed their several offenses at different times or place • • • in other words that they are not guilty of the one and same offense, the proof does not sustain the indictment.

In the present case, according to the recitals in the pleading—each defendant was equally guilty, but they did not participate in one and the same offense. This was not shown until the evidence was given to the jury. At that stage of the trial, each defendant was placed in legal jeopardy and was entitled to have a verdict of the jury on the question of his guilt • • •."

"The defendants having been placed in jeopardy, and being entitled to a verdict of acquittal on the proof made, must be allowed the benefit of the verdict that they were entitled to, and cannot be again tried for the same offense."

Claim II. That the state cannot contrive such a conviction as shown by this record.

In *Brown* v. *Mississippi*, found in the Supreme Court Advance Sheet of March 1, 1936, at page 427, this Court said:

"The state may not deprive the accused of the aid of counsel."

"Nor may a state through the action of its officers contrive a conviction through the pretense of a trial which in truth if "but a means of depriving a defendant of his liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

"The due process clause requires "that state action whether through one agency or another, shall be consistent with the fundamental principles of liberty and

justice, which lie at the base of all our civil and political institutions."

And in the same case the Honorable Chief Justice, denominated such a trial as "a solemn farce."

Summary of the Argument.

A.

The decision of the Supreme Court of the State of Washington, under the facts as herein set out, wherein the said court held that the law under which petitioners were sentenced, was not *ex post facto*, and in contravention of Art. 1, Sec. 10 of the United States Constitution, is directly contrary to the decisions of this Court, wherein it has been invariably held that such laws are *ex post facto*.

And the said decision is contrary to the decisions of this Court, of the State courts, cited, as well as contrary to its own decisions (which are not overruled) but which are ignored.

The identical law in question has recently been passed on and held *ex post facto* in *Andrus* v. *McCauley* (decision appended).

And to hold that the State can charge defendants under one state of facts in an information, and then submit to the trial jury as to one defendant an entirely different state of facts, not charged, this trying two defendants in one trial, on several charges, and then sustaining a joint verdict, is a direct denial of "due process".

And to use illegal convictions and void sentences for the purpose of casting aspersions on the testimony of defendants when they undertake to defend themselves, and then to deny defendants all opportunity of showing the fact of the invalidity of the judgments used for conviction, when such fact has already been judicially declared by competent courts, is in all substantial effect to deny defendants a right

to defend at all; it is but another method of striking their testimony, but even worse, because it affects their character and puts the impression before the jury wrongfully, that they have theretofore been convicted of crime, when such fact does not exist.

The State started out in this trial to use every method in their power to deny these petitioners a right to defend themselves, and with the intention to convict them somehow, even to the extent of trying them for an offense with which they had no *notice* and with which they had never been charged. Such methods belong to the dark ages, but have no place in a civilized country. A defendant has a right to be tried as other citizens are tried, and in accordance with the principles of law, which are the result of centuries of experience, and have become fundamental.

The petitioners made claim to their rights under the Federal Constitution before their state courts; those courts denied the challenge, and refused to apply the corrective; refused to even consider the constitutional questions, and evaded and ignored them.

Conclusion.

It is, therefore, respectfully submitted, that this case is one calling for the exercise by this Court of its supervisory powers, in order that it may review the final judgment of the court of last resort of the State of Washington, the said Supreme Court, and correct the errors therein made, and protect the petitioners in their rights, privileges and immunities granted to them by the Constitution of the United States, and that to such an end a writ of certiorari shall be granted and this Court should review the decision of the said Supreme Court of the State of Washington and finally reverse it.

ELBERT B. LINDSEY,
Pro se.

E. R. LINDSEY,
Pro se.

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 660.

ELBERT B. LINDSEY AND E. R. LINDSEY, *Petitioners*,

vs.

STATE OF WASHINGTON, *Respondent*.

On Petition for Writ of Certiorari.

Appendix 1 to brief, being a copy of Chapter 114, Laws of Washington, 1935, p. 308, which took effect at midnight June 12, 1935, being the law under which petitioners were sentenced and which it is claimed is *ex post facto* as to petitioners.

Chapter 114 of Laws of Washington for 1935.

Be it enacted by the Legislature of the State of Washington:

Rem. Rev. Stat. Sec. 10249-1.

SECTION 1. There is hereby created a board of prison, terms and paroles to administer the provisions of this act. The functions, powers, duties and limitations of this body and the qualifications and the tenure of office of its members will be as hereinafter set forth.

Rem. Rev. Stat. Sec. 10249-2.

SECTION 2. When a person is convicted of any felony except treason, murder in the first degree, carnal knowledge of a child under ten years, or of being a habitual criminal within the meaning of the statute which provides for life imprisonment for such habitual criminals, and a new trial is not granted, the court shall sentence such person to the penitentiary, or, if the law allows and the court sees fit to exercise such discretion, to the reformatory, and shall fix the maximum term of such person's sentence only.

The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term; if the law does not provide a maximum term for the crime

for which such person was convicted, the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment; provided, however, that in any case where such maximum term is fixed by the court that maximum term shall be fixed at not less than twenty (20) years.

If the sentence of a person convicted is not suspended by the court, it is hereby made the duty of the superintendent of the penitentiary and the superintendent of the reformatory to receive such person, if committed to his respective institution, and to imprison him or her until released under the provisions of this act or through the action of the governor.

After the admission of such convicted person to the penitentiary or reformatory, as the case may be, it shall be the duty of the board of prison, terms and paroles to obtain from the sentencing judge and the prosecuting attorney, a statement of all the facts concerning such convicted person's crime and any other information of which they may be possessed relative to such convicted person, and it shall be the duty of the sentencing judge and the prosecuting attorney to furnish the board of prison, terms and paroles with such information. It will also be the duty of the sentencing judge and the prosecuting attorney to indicate to the board of prison, terms and paroles, for its guidance what, in their judgment, should be the duration of such convicted person's imprisonment.

Within six months after the admission of such convicted person to the penitentiary or the reformatory, as the case may be, the board of prison, terms and paroles shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court where the law does not provide for a maximum term.

When a convicted person appeals from his or her conviction and is at liberty on bond pending the determination of his or her appeal by the supreme Court, credit on his or her sentence will begin from the date of the remittitur. In all other cases, credit on a sentence will begin from the date the judgment and sentence is signed by the court.

In case any convicted person undergoing sentence in the penitentiary or the reformatory commits any infraction of the rules and regulations of the penitentiary or reformatory, as the case may be, the board of prison, terms and paroles may revoke any order theretofore made determining the length of the time such convicted person shall be imprisoned, and make a new order determining the length of time he or she shall serve, not exceeding the maximum penalty provided by law for the crime for which he or she was convicted, or the maximum fixed by the court. Such revocation and redetermination shall not be had except upon a hearing upon the question of the infraction of the rules charged to such convicted person before the board of prison, terms and paroles. At such hearing, the convicted person, unless outside the walls of the penitentiary or reformatory, as an escapee and fugitive from justice, shall be present and entitled to be heard and may present evidence and witnesses in his behalf.

Any convicted person undergoing sentence in the penitentiary or the reformatory, not sooner released under the provisions of this section, shall, in accordance with the provisions of existing law, be discharged from custody on serving the maximum punishment provided by law for the offense for which such person was convicted, or the maximum term fixed by the court where the law does not provide for a maximum term.

The following limitations will be placed on the board of prison, terms and paroles with regard to fixing the duration of confinement in certain cases, notwithstanding any provision of the law specifying a lesser sentence, to-wit:

(a) For a person not previously convicted of a felony but armed with a deadly weapon either at the time of the commission of his or her offense, or concealed deadly weapon at the time of his or her arrest, the duration of such person's confinement shall not be fixed at less than five years.

(b) For a person previously convicted of a felony either in this state or elsewhere and who was armed with a deadly weapon at the time of the commission of his or her offense, or a concealed deadly weapon at the time of his or her arrest, the duration of such person's confinement shall not be fixed at less than seven and a half years.

The words "deadly weapon" as used in this section are hereby defined to include any instrument known as blackjack, sling shot, billy, sand-club, sand bag, metal knuckles, and dirk, dagger, pistol, revolver or any other firearms, and knife having a blade longer than three (3) inches, any razor with an unguarded blade and any metal bar or pipe used or intended to be used as a club, and explosive, and any weapon containing poisonous or injurious gas; Provided further, that any inmate of the reformatory who is under the age of twenty-one (21) years, at the time of commitment, may be paroled by the board without regard to the limitations set forth in this section.

The board of prison, terms and paroles shall require of every able bodied convicted person imprisoned in the penitentiary or reformatory as many hours of faithful labor in each and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the institution in which he or she is confined.

Every prisoner who has a favorable record of conduct at the penitentiary or the reformatory, as the case may be, or the laws of the State, and who performs in a faithful, dilligent, industrious, orderly and peaceful manner the work, duties and tasks assigned to him to the satisfaction of the superintendent of the penitentiary or the reformatory, as the case may be, and in whose behalf the superintendent of the penitentiary or reformatory shall file a report certifying that his or her conduct and work has been meritorious and recommending allowance of time credits to him or her, shall upon, but not until, the adoption of such recommendation by the board of prison, terms and paroles, be allowed time credit reduction from the term of imprisonment fixed by the board of prison, terms and paroles.

(c) Any person who shall have been convicted of embezzling funds from any institution of public deposit of which he was an officer or stockholder such person's confinement shall not be fixed at less than five years.

Rem. Rev. Stat. Sec. 10249-3.

SECTION 3. To assist in fixing the duration of a convicted person's term of confinement, prescribing treatment for such person while in confinement and supervising or regu-

lating his or her activities while on parole, it shall not only be the duty of the board of prison, terms and paroles to thoroughly inform itself as to the facts of such convicted person's crime but also to inform itself as thoroughly as possible as to such convict as a personality. The board of prison, terms and paroles, must, therefore, adopt and apply an effective technique, of investigation to develop information for that purpose.

Rem. Rev. Stat. Sec. 10249-4.

SECTION 4. The board of prison, terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or reformtory, as the case may be, on parole, after such convicted person has served the period of confinement fixed for him or her by the board of prison, terms and paroles, less time credits for good behavior and dilligence for work as provided by this board; provided, that in no case shall the inmate be credited with more than one-third of his sentence as fixed by the board.

The board of prison, terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion.

The board of prison, terms and paroles may impose as a condition of a parole granted a convicted person that all or a portion of his or her credits earned, or to be earned, shall be forfeited in the event that such convicted person shall break his or her parole, or violate any law of the State or rule or regulation of the penitentiary or reformatory, as the case may be, or the board of prison, terms and paroles.

Such forfeiture of credits shall not be had except upon a hearing upon the question of such violation and upon the finding of the board of prison, terms and paroles that such convicted person was guilty thereof, which adjudication shall be final. At such hearing such convicted person unless outside the walls of the penitentiary or reformatory, as the case may be, as an escapee and a fugitive from justice,

shall be present and entitled to be heard and present evidence and witnesses in his or her behalf.

The written order of the board of prison, terms and paroles, bearing the seal of that body, shall be sufficient warrant for all officers named in this section to take into custody any convicted person who may be on parole and retain such person in his custody until arrangements can be made by the board of prison, terms and paroles for his or her return to the institution from which he or she was paroled.

It is hereby made the duty of all chiefs of police, marshals of cities and villages, sheriffs of counties, and all police, prison and peace officers and constables to execute any such order in the same manner as any ordinary criminal process.

The board of prison, terms and paroles shall cause a complete record to be kept of every prisoner released on parole. Such record shall be organized in accordance with the most modern methods of filing and indexing so that there will be always immediately available complete information about each such prisoner. The board of prison, terms and paroles may make rules as to the privacy of such records and their use by others than the board of prison, terms and paroles and its staff.

The superintendent of the penitentiary and the reformatory and all officers and employees thereof and all other public officials shall at all times cooperate with the board of prison, terms and paroles and shall furnish to such board, its officers and employees such information as shall be necessary to enable it to perform its functions, and such superintendents and other employees shall at all times give the members of such board, its officers and employees free access to all prisoners confined to in the penal institutions of this state.

It is understood that no provision of this act shall limit or circumscribe the powers of the governor of the state to commute the sentence of, or grant a parole to, any convicted person, and the governor is hereby authorized to cancel and revoke the parole granted to any convicted person by the board of prison, terms and paroles. The written order of the governor of the state cancelling or revoking such parole shall have the same force and effect and be ex-

ecuted in like manner as any order of the board of prison, terms and paroles.

From and after the suspension, cancellation or revocation of the parole of any convicted person and until his return to custody, he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee or fugitive from justice shall be a part of his term.

The board of prison, terms and paroles shall make all necessary rules and regulations to carry out the provisions of this act not inconsistent therewith, and may provide the forms for all documents necessary therefor.

The provisions of this act so far as applicable thereto are to apply to all convicted persons now serving time in the penitentiary or the reformatory, to the end that at all times the same provisions relating to sentences, imprisonments and paroles of prisoners shall apply to all the inmates thereof.

Rem. Rev. Stat. Sec. 10249-5.

SECTION 5. Whenever in its judgment the best interests of the state or the welfare of the prisoner confined in any penal institution shall be better served by his or her transfer to another institution the board of prison, terms and paroles is authorized to order and effect such transfer.

The board of prison, terms and paroles shall direct the transportation of convicted persons to the penitentiary and the reformatory and is hereby vested with authority to employ necessary persons for such purpose and to utilize the services of such persons for the supervision of convicted persons on parole whenever possible.

Rem. Rev. Stat. Sec. 10249-6.

SECTION 6. Whenever the sentence of a convicted person to the penitentiary or reformatory is suspended by the court under authority of Section 2280 of Remington's Compiled Statutes, the board of prison, terms and paroles will assume and undertake the supervision of such person during the period of such suspension or until such sentence is terminated by the governor. The board of prison, terms and paroles will promulgate rules and regulations for the conduct of such person during the time the suspension of his or her sentence is in effect.

Whenever in the opinion of the board of prison, terms and paroles the suspension granted by the court under the provisions of Section 2281 of Remington's Compiled Statutes should be revoked, the said board of prison, terms and paroles shall notify both the prosecuting attorney and the presiding judge of the Superior Court for the county wherein the sentence was suspended, to the end that appropriate action may be taken in the premises. If an order of court is made revoking the suspension of a sentence, the convicted person shall be forthwith admitted to the penitentiary or the reformatory, as the case may be, and the board of prison, terms and paroles shall thereafter fix the duration of such person's confinement in the manner provided for by Section 2 of this act.

SECTION 7. It shall be the duty of the board of prison, terms and paroles, when requested by the governor, to pass on the representations made in support of applications for pardon or the restoration of civil rights for convicted persons and to make recommendation thereon to the governor.

It will also be the duty of the board of prison, terms and paroles to exercise supervision over such convicted persons as shall have been conditionally pardoned by the governor, to the end that such persons shall faithfully comply with the condition of such pardons.

SECTION 8. (Provides for the appointment, salaries and tenure of office of the members of the board.)

SECTION 9. Sections 2278, 2281, 2282, 2195, 10247, 10248, 10249, 10238, 10239, 10803, 10280-6, 10280-10, 10280-11, 10280-12, 10280-15, 10280-16, 10237-1 and 10237-2, of Remington's Revised Statutes of Washington, be, and the same are hereby repealed.

Passed by the House March 8, 1935.
Passed by the Senate March 6, 1935.
Approved by the Governor March 20, 1935.

All acts passed by the session, approved by the governor, take effect ninety days after adjournment, or 12 o'clock midnight, June 12, 1935, except relief bills, appropriation bills and other acts declaring an emergency.

ERNEST E. HUTCHINSON,
Secretary of State.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1936.

No. 660.

Elbert B. Lindsey and E. R. Lindsey, *Petitioners*,

v.

State of Washington, *Respondent*.

On Petition for Writ of Certiorari.

Appendix 2, to brief, being a copy of the opinion rendered by Cavanah, District Judge, on November 21, 1936, in the case of *Andrus* v. *McCauley et al.*, No. L. 1421, in the United States District Court for the Eastern District of Washington, Southern Division, at Walla Walla, Washington, wherein it was held that Chap. 114, Laws of Washington, 1935, was ex post facto, and granted a writ of habeas corpus, on facts identical with those in the case at bar.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

No. L. 1421.

Ray Andrus, Inmate No. 16154, Washington State Penitentiary, Walla Walla, Washington,

vs.

J. M. McCauley, Warden, Washington State Penitentiary, Walla Walla, Washington; Louis F. Bunge, Thomas B. Waters, W. J. Danley, Members of Parole Board, Olympia, Washington.

November 21, 1936.

E. D. Phelan, 1810-11 Smith Tower, Seattle, Washington, Attorney for petitioner.

J. H. Hamilton, Attorney General for the State of Washington, Olympia, Wash., Attorney for defendants.

Cavanah, District Judge:

The petitioner has filed an amended petition for a writ of habeas corpus since his original petition was disposed of by

the court, and in which he alleges additional facts. In the opinion of the court filed on August 3, 1936, the conclusion was reached that there was not sufficient facts or reasons alleged in the original petition to warrant the issuance of the writ and therefore the petition was dismissed. After considering the amended petition the Court entered an order for the Warden of the Penitentiary of the State of Washington to show cause on October 8, 1936, why a writ of habeas corpus should not issue.

The facts alleged in the amended petition are the same as set forth in the original petition with the additional allegations that at the time of the sentence of the petitioner there was in force Section 2281 of the statutes of Washington, known as "The Indeterminate Sentence Law," which provides that "Where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than 6 months nor more than 5 years," and that had his trial been prior to June 12, 1935, on a crime committed prior to May 17, 1935, it would have been the duty of the court to fix the indeterminate sentence to consist of a definite minimum as well as a definite maximum, the former to be not less than six months, nor more than five years, and the length of both in the discretion of the court, and that he was sentenced by punishment in excess of that annexed to the crime at the time of its commission, and which was unauthorized by law, and further he alleges that he was deprived of the right of restoration of citizenship which alters his situation to his disadvantage, for at the time of the commission of the crime the right of restoration of citizenship was not in the governor, while under the enactment of 1935 it is now vested in the governor of the State.

The Warden answered the petition and alleges that the petitioner was convicted of forgery in the first degree in the State court and sentenced to a term of not more than 20 years in the State Penitentiary on June 18, 1935; that thereafter on September 16, 1935, in accordance with the provisions of Section 2, Chap. 114, laws of Washington for 1935 the sentencing judge and the prosecuting attorney of King County furnished to the Board of Prison, Terms and Paroles of the State a statement of all the facts concerning petitioner's conviction, and in which the term recommended

by the sentencing judge was 2 years. It further appears from the answer that the Board under authority contained in Section 2, Chap. 114, laws of 1935, fixed the minimum duration of the sentence which petitioner should receive at not less than 3 years; that neither the records of the Supreme Court nor the Prosecuting Attorney's office of King County show that any application for a writ of habeas corpus or for any other relief has been filed by petitioner.

The facts were stipulated and it appears therefrom that the petitioner was on May 17, 1935, charged with the commission of forgery in the first degree by the issuance of checks on April 20, 1935, and the judgment and sentence was entered on June 18, 1935, for a term of not more than 20 years; that Chapter 114 of the laws of 1935 went into effect on June 12, 1935; that section 2281 of the statutes of the State was repealed by chapter 114, but was in effect at all times prior thereto, and that section 2583 of the statutes of the state was not repealed by chapter 114.

The petitioner now alleges the same contention presented by him on his original petition that he was unlawfully deprived of his liberty for the reason that the enactment of 1935 concerning the power of the Board of Prison, Terms and Paroles to fix the duration of the term of his imprisonment and change the procedure as to the restoration of his citizenship is an ex post facto law in violation of both state and Federal Constitutions, and asserts that at the time his original petition was presented to the court attention was not called to the existence of section 2281, which was in force at the time the crime was committed; and which required a minimum sentence of not less than six months nor more than five years, and as that section was repealed by chapter 114 under which his sentence was pronounced, the court could no longer impose a minimum sentence. Stress is further made that under section 2281 the minimum must be fixed by the court, and therefore after considering that section with section 2583 and section 2 chapter 114 of the 1935 enactment the manner and extent of the punishment imposed for the crime here charged was changed by the enactment of the law of 1935 to his disadvantage.

These provisions of the statutes read: (Sec. 2281, Sec. 2583 and Sec. 2, Chap. 114, session laws of 1935 set out in full.)

Rem. Rev. Stat., Sec. 2281 (Indeterminate Sentences. #29)

"Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the state penitentiary, or in the Washington State Reformatory, as the case may be, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and when no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment."

Rem. Rev. Stat., Sec. 2583. Forgery—First Degree. #331.

"Every person who, with intent to defraud, shall forge any writing or instrument by which any claim, privilege, right, obligation or authority, or any right or title to property, real or personal, is or purports to be, or upon the happening of some future event may be, evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, or any request for the payment of money or delivery of property or any assurance of money or property, or any writing or instrument for the identification of any person, or any public record or paper on file in any public office, or any certified or authenticated copy of such record or paper, or any entry in any public or private record of account, or any judgment, decree, order, mandate, return, writ or process of any court, tribunal, judge, justice of the peace, commissioner or magistrate, or the official return or report of, or a license issued by, any public officer, or any pleading, demurrer, motion, affidavit, appearance, notice, cost-bill, statement of facts, bill of exceptions or proposed statement of facts or bill of exceptions in any action or proceeding whether pending or not, or the draft of any bill or resolution that has been presented to either house of the

legislature of this state, whether engrossed or not, or the great seal of this State, the seal of any public officer, court, notary public or corporation, or any public seal authorized or recognized by the laws of this state or any other state or government, or any impression of any such seal; or shall forge or counterfeit any coin or money of any state or government, or any bank or treasury bill, any note or postage or revenue stamp; or who, without authority shall make or engrave any plate in the form of similitude of any writing, instrument, seal, coin, money, stamp or thing which may be the subject of forgery, shall be guilty of forgery in the first degree and shall be punished by imprisonment in the state penitentiary for not more than twenty years."

(NOTE.) For the sake of avoiding repetition, Sec. 2, of Chap. 114, Laws of Washington, 1935, is not copied herein but is found in entire law attached as an appendix.)

It is obvious that section 2281 which was in force at the time the crime was committed, provides that whenever any person shall be convicted of any offense where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion, at not less than 6 months nor more than 5 years, the court was there required to fix a minimum of not less than 6 months nor more than 5 years. One sentenced where no minimum is fixed by law was entitled to a minimum sentence between 6 months and 5 years, and the period of which is to be in the discretion of the court. It is further provided in section 2583 which fixes the maximum term of sentence for forgery in the first degree at a term of not more than 20 years, was not repealed by chapter 114, and was in force both at the time the crime charged was committed and when the petitioner was sentenced, and that section 2281 provides for the imposing of a minimum sentence between 6 months and 5 years. Now section 2 of chapter 114 of the enactment of 1935 provides that when a person is convicted of forgery in the first degree, which is a felony, the punishment shall be the maximum term fixed by law, and if the law does not provide a maximum term the court shall fix such maximum

term which shall be for any number of years up to and including life imprisonment, but not less than 20 years.

The Attorney General of the State in resisting the issuance of the writ asserts; first, that the writ of habeas corpus is not the proper remedy on behalf of the petitioner, and, second: that the enactment of 1935 is not ex post facto as it does not inflict a greater punishment or alter petitioner's situation to his disadvantage as he was sentenced under the enactment of 1935 which merely creates a parole board and under section 2583 which was in force at the time the crime was committed. It would seem clear that the remedy is granted to the petitioner under Section 10, Article One of the Federal Constitution, which provides that: "No State shall • • • pass any bill of attainder, ex post facto law • • •.", and under Sections 451-466 of Title 28 U. S. C. A. Where the legality of his sentence and punishment are involved and is based upon the contention that the law under which he was sentenced is an ex post facto one, and the facts show that the sentence inflicts a greater punishment than the law annexed to the crime at the time it was committed, or alters the situation of the accused to his disadvantage, the remedy by writ of habeas corpus is granted.

We find that at the time the alleged crime was committed on April 20, 1935, as charged in count one of the information both sections 2281 and 2583 of the statutes of the State of Washington were in force and by section 2583 the court was required to sentence the petitioner to not more than 20 years imprisonment. This later section was also in force at the time the sentence was pronounced by the court who had the discretion, under it, to pronounce a maximum sentence for any period within 20 years, and had not section 2281 been repealed would have been required to pronounce a minimum of not less than six months nor more than five years, as provided for by section 2281, or, in other words, the court would have been required to pronounce both a maximum and a minimum, because section 2583 providing for the maximum sentence does not fix the minimum sentence thereby requiring the application of section 2281.

The inquiry then arises, does the failure to pronounce a minimum sentence as provided for by section 2281 and the pronouncement of a flat sentence of not more than 20 years under the enactment of 1935 increase the punishment of petitioner or change the situation to his disadvantage. The clear rule of law to test ex post facto legislation under the term as found in the constitution of the United States and recognized by the Supreme Court was laid down by Mr. Justice Chase in the case of Calder *v.* Bull, 1 Law Ed. 648, where it is said:

(1) Every law that makes an action, done before the passing of the law and which was innocent when done, criminal and punishes such action;

(2) Every law that aggravates the crime or makes it greater than it was when committed;

(3) Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed;

(4) Every law that alters the legal rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

Also ex parte Medley, 134 U. S. 160.

By this test and term we are required to make an analysis of the provisions involved in the statutes of the state and ascertain whether they should be applied to the sentence and punishment of the petitioner. It is apparent that after the repeal of section 2281 which required the application of a sentence as to a maximum sentence at the time the crime was committed and the modification of section 2583 by section 2 of the enactment of 1935, the law in force at the time the crime was committed was changed by the enactment of 1935 which changed the punishment and inflicted a greater punishment than the law annexed to the crime when committed, by the repeal of section 2281 guaranteeing to the petitioner at the time the crime was committed a minimum sentence of not less than six months nor more than 5 years, prohibited the court from

pronouncing a minimum to which the petitioner was entitled and which worked to his disadvantage in considering of the application for parole as he would have become subject to the consideration of a parole after he had served the minimum sentence, by a parole board of three persons, sections 2282 and 10803 statutes of the state, and further it appears clear that under section 2583 which was in force at the time the crime was committed, fixing the maximum of not more than 20 years in the discretion of the court, which also was changed by the enactment of 1935 which changed the punishment and inflicted a greater punishment than the law imposed at the time the crime was committed, as it is there provided that "The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term; if the law does not provide a maximum term for the crime for which such person was convicted, the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment; provided, however, that in any case where such maximum term is fixed by the court that maximum term shall be fixed at not less than 20 years. So it will be seen by section 2 of the enactment of 1935 a definite maximum punishment of 20 years is fixed which the court is compelled to pronounce and its discretion to fix the sentence for any time less than 20 years has been removed. The petitioner, therefore, was at the time of his sentence entitled to the discretion of the court in fixing his sentence to be at any definite time less than 20 years as a maximum. This he was deprived of, by the enactment of 1935, as section 2 thereof requires the board to fix the duration of his sentence at any time within the 20 years pronounced by the court, for it is there provided that: "Within six months after the admission of such convicted person to the penitentiary or reformatory, as the case may be, the board of prison, terms, and paroles shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court where the law does not provide for a maximum term."

No other construction can be placed on the statute as it says "the board of prison, terms and paroles shall fix the duration of his or her confinement", which shall not exceed the maximum provided by law or the maximum fixed by the court.

Mathematically the operation of section 2 of the 1935 enactment inflicts a greater punishment than the law inflicted at the time the crime was committed. That was the result as to petitioner's sentence as his maximum sentence expires June 18, 1955, which the court fixed for a term of not more than 20 years, and being for a definite maximum term of 20 years which he was compelled to pronounce under section 2 of the 1935 enactment. The sentencing judge after being compelled under section 2 of the 1935 enactment to pronounce the maximum of 20 years recommended 2 years, although the newly created board fixed the term of imprisonment at 3 years. If the 1935 enactment was not an ex post facto law the period of confinement of petitioner would be 3 years as fixed by the board, and which is, if the application is had of section 2 of the 1935 enactment, a definite sentence of three years, as the board has fixed that duration of the term of sentence for three years, and it cannot be said when acting under authority granted by this new law that the term fixed by the board was the minimum, for it had no such authority to fix a minimum, but only to fix the duration of confinement at any time under 20 years, and not between certain limits. But it is further urged by the Attorney General of the State that the 1935 enactment does not inure to the disadvantage of the petitioner in the matter of the duration of his imprisonment, as it only creates a board of paroles who fixes the minimum sentence within the maximum fixed by the law or the court. This construction cannot be followed, if, as already said, that section 2 of the 1935 enactment requires of the board to "fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense. That provision has no relation to vesting power in the board to fix a minimum or to parole, but relates solely to the fixing of a definite term of imprisonment, with only the limitation of the maximum fixed by law or

the court. The sentencing judge evidently had in mind that the petitioner should not serve a sentence of more than two years, as that was his recommendation, when he attempted to follow section 2 of the 1935 enactment that "it will also be the duty of the sentencing judge and the prosecuting attorney to indicate to the board of prison, terms and paroles, for its guidance what, in their judgment, should be the duration of such convicted person's imprisonment.

There again it is expressly provided that the power granted to the board is to fixing "the duration of such convicted person's imprisonment", and not a minimum.

If this construction of section 2 of the 1935 enactment be correct then it operates to change the situation of the petitioner to his advantage, which was done. So it will be seen that the sentence is not one inflicted by the court, because the term is definitely fixed by the board, to which the legislature in effect has attempted to grant power judicial in character to the board to fix a definite sentence, and is not either a minimum sentence or a matter of prison discipline.

It was thought at the time the original petition was presented to the court that the enactment of 1935 did not change the situation of petitioner to his disadvantage as the sentencing judge had power to pronounce a maximum sentence of twenty years, and the board having fixed the sentence of petitioner at 3 years, he was not prejudiced, but upon further consideration of the new law together with sections 2583 and 2281 of the statutes of the State, the conclusion there reached should be modified to the effect as here stated, and that the enactment of 1935, so far as it attempted to be applied to the sentence and term of confinement of petitioner is ex post facto in effect, and the term of imprisonment attempted to be fixed by the board of prison, terms and paroles, of the petitioner is illegal and of no effect, and it so being illegal the State trial court still has jurisdiction to impose a correct sentence, although the term at which he pleaded guilty and was sentenced has passed. The record shows that the petitioner was properly convicted. The error was in the sentence of the

court and in the attempt of the board of prison, terms and paroles to fix a definite term of imprisonment under an ex post facto law, and there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the State trial court in which he was convicted. This procedure is in compliance with section 461 Title 28 U. S. C. A., which requires a Federal Court in a proceeding for a writ of habeas corpus "to dispose of the party as law and justice require" and in the interpretation of the Federal Statute by the 8th Circuit Court of Appeals in the case of Bryant *v.* U. S., 214 Fed. 51, where the rule is clearly stated and the authorities reviewed, and further that it should be considered that because Sec. 2281 of the statutes of the State, relating to the minimum sentence was repealed by the enactment of 1935, it does not prevent the State trial court from now applying it to the sentence of the petitioner, for it was in force at the time the crime here was committed and the petitioner is entitled to its application when he is sentenced, under the reasons thus given, because its repeal by the latter act is ex post facto in effect.

As to petitioner's contention that the enactment of 1935 deprived him of the right of restoration of citizenship which alters his situation to his disadvantage, it is thought that since the accused has still the right of restoration of citizenship under the 1935 enactment, to be considered and determined by the Governor of the State.

In view of the conclusion thus reached the petitioner is remanded to the custody of the Sheriff of King County, Washington, to be taken before the State Superior Court of King County, and sentence properly imposed.